

AMERICAN ARBITRATION ASSOCIATION

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In the Matter of the Arbitration between:

**FRATERNAL ORDER OF POLICE,
LODGE No. 5**

-AND

**AWARD AND
OPINION**

CITY OF PHILADELPHIA, PA

Docket No. 14-20-1300-1658 (Consolidated)

Grievant: Teresa A. Brooks-Whitaker. Payroll No. [REDACTED]

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BEFORE:

ERNEST WEISS, ARBITRATOR

APPEARANCES:

For the Union: Marc L. Gelman, Esq.
Jennings Sigmond, P.C.

For the City: Christian Kerstetter, Esq.
City of Philadelphia Law Dept.

Issue: Did the City of Philadelphia have just cause for the discipline it issued to P. O. Theresa A. Brooks-Whitaker and if not, what shall be the remedy?



PRELIMINARY STATEMENT

Having been selected in accordance with the collective bargaining agreement ("CBA") between the parties hereto, on September 22, 2014, I conducted an arbitration at the offices of the American Arbitration Center, 230 Broad Street, 12th floor, Philadelphia, PA, at which time the parties were afforded full opportunity to present evidence and argument in support of their respective positions. At that time, both the City and the Union submitted exhibits that were admitted, after some argument, along with joint exhibits. No post-hearing briefs were submitted.

BACKGROUND

The City and the Union are parties to a CBA. On June 6, 2012, Police Officer Brooks (hereinafter "Brooks" or "Grievant") is alleged to have threatened her superior officer, the then Sgt. B [REDACTED] (hereinafter "B [REDACTED]") in the view and presence of other police officers at their squad headquarters located in the Narcotics North Headquarters.

The incident took place in a large room with computers on either side of a table. B [REDACTED] was seated on one side of the table facing Brooks on the other side. Brooks was working on paperwork related to an arrest she made, and B [REDACTED] was eating his lunch. They were some four to five feet apart, and several other police officers were present. The Grievant became aware of a clerical error regarding her overtime, which had not been recorded on the payroll system, which she confirmed. Grievant then allegedly threatened B [REDACTED].

Witnesses testified, in various forms, that she used profanity toward him and stated that she was not afraid of him. She has denied any use of profane language, but has conceded that she did make the statement that she was not afraid of him. When those statements were allegedly made, four people were in the room within earshot: B [REDACTED], Police Officers M [REDACTED] W [REDACTED] ("W [REDACTED]"), M [REDACTED] S [REDACTED] ("S [REDACTED]"), and Brooks. Except for Brooks, the others present substantially agree to what was said and whom it was said.

Following an investigation into these remarks, initiated by B [REDACTED]'s report of the incident, formal charges were made against Brooks: two counts of insubordination. After a full hearing, The Police Board of Investigation ("PBI") found her guilty of one count of insubordination, "for using profane language toward or in relation to a superior officer." Grievant was given a 15-day suspension without pay and a transfer out of the unit. The discipline imposed was within the matrix in the Disciplinary Code in use at that time. The Grievant seeks a reversal of the determination, together with a number of remedies, including back pay, reversal of the transfer and that the disciplinary record be expunged. The City seeks a ruling that the discipline was imposed for just cause.

THE CITY'S CONTENTIONS

Lieutenant B [REDACTED]'s Testimony

After sequestering the witnesses, Lt. B [REDACTED] testified on direct examination that he encountered Brooks between 5 and 6 p.m. on June 6, 2012. He stated that after W [REDACTED] whispered something to her, which E [REDACTED] did not hear, Brooks looked directly at him and began shouting obscenities at him, including, twice saying "I'm going to tear his ass up," and "he's going to earn his bars." E [REDACTED] stated that he subsequently learned that her outburst was triggered by an error that he had made in failing to complete the process for her to receive eight hours of overtime that she earned. He learned from Corporal K [REDACTED] that he had, in fact, missed entering her overtime. He testified that he did not say anything or respond to her in any way. He stated that W [REDACTED] and S [REDACTED] were nearby. He acknowledged that he, as well as other supervisors, make mistakes in recording overtime, since there are about 20-25 police officers getting overtime every day. He testified that he thought he made 2-3 errors per month for about 300 police officers. He stated that he had not omitted Brooks' overtime intentionally.

On cross-examination, B [REDACTED] testified that he had only worked with Brooks for about six months, that he was in the unit for only nine months, and upon promotion to lieutenant, was moved to a new assignment. He claimed that although he had made many overtime mistakes, this was the

first such mistake on Brooks' overtime. In response to Attorney Gelman's ("Gelman") question, he testified that prior to this incident, he considered Brooks one of his best cops who worked very hard, was very meticulous and had never been a problem. He testified that he had not known that Brooks had complained to Internal Affairs ("IA") even before this incident, and that he was learning of the earlier complaint for the first time that day.

He stated that immediately after W [REDACTED] whispered something in her ear, she said something like, "I wish he would have missed it," and that she did not get up and leave the room in his presence. In response to Gelman's further questioning, he stated that he did not respond to Brooks, first because he was stunned by the sudden attack, and second that supervisors are taught to remain calm lest the situation escalate. Furthermore, he needed to investigate the nature of the problem, and did so by discussing it with Corporal K [REDACTED].

He stated that he gave a statement to IA later in June 2012, because she told him that she would be giving a statement to IA. He acknowledged that he issued a memo to his commanding officer, Captain D [REDACTED] F [REDACTED], on June 7, in which he complained of Brooks' conduct and requested disciplinary action. The memo, U-1, was offered and admitted into evidence. In reviewing the memo, B [REDACTED] stated that he doesn't know why the threatening remarks that "he would earn his bars" and that she "wasn't afraid of him" aren't in the memo.

U-2, the B [REDACTED] interview statement taken by Lt. M [REDACTED], of Strike Force, on June 20, 2012 and signed by the lieutenant and B [REDACTED] was offered and admitted into evidence. B [REDACTED] identified his signature, and stated he understood that his signature attested to the truthfulness of the statement.

B [REDACTED] acknowledged that Brooks never used his name, only referring to "he" when she was making her comments, but that she was making eye contact with him at the time. Finally, he didn't include D [REDACTED] W [REDACTED] as being present when Brooks made her remarks, since W [REDACTED] was walking out of the room at the time.

M [REDACTED] W [REDACTED]'s Testimony

On direct examination, M [REDACTED] W [REDACTED] testified that he was present when Brooks made profane statements twice following her comment that "it (the overtime earned) had better be in there or I'm gonna take it to his ass." He further testified that Brooks made the statement, "I'm not afraid of you. I'm gonna show you." W [REDACTED] believed that the remarks were directed at B [REDACTED], since neither he nor S [REDACTED], who was also present, had put in for overtime, so the only one to whom she could have directed her comments was B [REDACTED]. Further, he testified that he did not hear B [REDACTED] make any response to Brooks.

On cross-examination, W [REDACTED] reaffirmed his previous testimony, adding that Brooks did not leave the room at that time. He stated that she never mentioned overtime. He confirmed that while he didn't know at that moment whether or not B [REDACTED] had missed her overtime, B [REDACTED] had missed his overtime and that of other police officers in the past. Differing with other testimony, he stated that Brooks was not looking at B [REDACTED], but rather at the computer screen where she was processing arrest paperwork.

M [REDACTED] S [REDACTED]'s Testimony

Police Officer S [REDACTED] testified on direct examination that he was present in the room within hearing distance of Brooks and B [REDACTED] on the evening of June 6, 2012, although he stated that she had seemed upset and stepped out of the room and returned quickly and made both the profane language remark and alleged threatening remark. Specifically, he testified that she said, "I'm gonna get that fucking ass. You don't intimidate me. You don't scare me." He testified that she was directly across the table from B [REDACTED]. He concluded that she was talking about B [REDACTED] because she didn't look at either him or the other police officer in the room, and neither of them had spoken to her. He testified that she spoke in a regular speaking voice, and B [REDACTED] made no response to her.

On cross-examination, he testified that he did not see W [REDACTED] speak to Brooks, although W [REDACTED] was present. He testified that "fuck" was part of

the profanity, but that he was not aware of any comments that she might have made about going to IA.

Detective Jeanette Smith's Testimony

Detective Smith ("Smith"), on direct examination, testified that she works at IA and was assigned to investigate the allegations made by Brooks on the evening of June 6, 2012. Her job is to gather facts and collect evidence. She stated that she is not a decision maker, that her commanding officer, Mark Everett was the decision maker. She stated that she recognized C-2 as the IA memo, which includes documentation and interviews that were part of the investigation. She testified that this investigation was unusual in that it began at the unit level and was taken over by IA at the request of the Chief Inspector of Narcotics. She stated that the conclusion she arrived at was that the allegations were sustained. C-2 was offered and admitted into evidence, although Gelman objected to it being treated as substantive evidence, since there was no opportunity to cross-examine the hearsay contained therein. C-2 was allowed into evidence, and the Arbitrator stated that he would give it the weight that it deserved.

On cross-examination, Smith stated that in the course of her investigation, she learned that there were five instances of overtime missed for Brooks over a period of four years, but doesn't know if B [REDACTED] was involved in those other occasions.

D [REDACTED] W [REDACTED]'s Testimony

On direct examination, W [REDACTED] testified that he neither observed nor heard any comments made by Brooks about the overtime omission. He acknowledged B [REDACTED] s and W [REDACTED] presence in the room, and did not believe that S [REDACTED] was present. He stated that upon returning to the processing room, he stayed for some three to four minutes to finish some paperwork, and then he and Brooks left the room and spoke with Corporal K [REDACTED] in his office. K [REDACTED] confirmed the omissions directly to Brooks.

FOP 5 CONTENTIONS

Attorney Gelman ("Gelman") representing the Fraternal Order of Police, Lodge #5 ("the Union" or "Association") opened, stating that the Grievant disagreed with the City's allegation of what she said. Gelman stated that there are two distinct parts that the Arbitrator will have to consider: first, it must be determined what exactly was said on June 6, 2012, taking into account the credibility of the witnesses, the fact that there was some history between Brooks and B [REDACTED]; and second, viewing the conduct of the Grievant and the Disciplinary Code section defining insubordination, whether the punishment fits the alleged code violation.

It is the Union's position that the Arbitrator's finding with respect to conduct should not rise to the level of insubordination. He stated that three weeks without pay and a transfer is a steep penalty and should require a steep breach of conduct, which does not exist in this case. Therefore, the Grievant requests the traditional "make whole" remedy. Specifically that the grievance be sustained, the transfer rescinded, back pay for all lost hours including lost overtime pay, and that the record of discipline be completely expunged from her file. Finally, he requested that the Arbitrator retain jurisdiction of the case to provide guidance as to the remedy if the grievance is sustained.

Theresa Brooks' Testimony

At the outset, Brooks testified that she was, in fact, paid for the eight hours of overtime, but was one paycheck late. On direct examination, she testified that she had almost twenty years with the Philadelphia Police Department, and almost ten years with the Narcotics Strike Force before being involuntarily transferred to District 35 in October 2013. She stated that although she had worked with B [REDACTED] for only about six months, the relationship was strained beginning in January 2012. She stated that she made her complaint(s) known to her immediate supervisor, Sgt. G [REDACTED], and to Lt. M [REDACTED], but the issue(s) continued unresolved. She indicated that one aspect of her complaint related to her overtime and stated that there were

three other occasions prior to the June incident where B [REDACTED] overlooked her overtime.

She confirmed previous testimony with respect to the location, date and time of the alleged incident, and how she learned of the current overtime omission from her partner, P.O. W [REDACTED], who provided her with a printout of her time. She denied speaking to anyone other than W [REDACTED] at that time. She said she continued to prepare her paperwork, only to look up and find that B [REDACTED] was laughing at her, and continued to do so. Officer J [REDACTED] came into the room to change his clothes and spoke to her, but she didn't respond because she knew that J [REDACTED] and B [REDACTED] were very good friends. In response to J [REDACTED]'s question as to what was wrong, she testified, "that his boy didn't pay her again." All the while, B [REDACTED] was smirking and laughing in a taunting kind of way. She testified that she didn't respond to B [REDACTED] in any way, but did tell J [REDACTED] that she was going to IA. At that point, B [REDACTED] left the room and she tried twice unsuccessfully to reach the lieutenant to report her intention to go to IA, but she only reached his voicemail.

She testified that she then left the room and went to K [REDACTED]'s office, where she found B [REDACTED] talking to him about the overtime. She testified that she asked to "let the Lieutenant know that she was going to IA and that B [REDACTED] was trying to incriminate her, but that she was not afraid of him."

She stated that soon after she left the building, going to the parking lot and that B [REDACTED] stood on the landing behind her and glared at her aggressively. She denied ever using profanity or speaking directly to B [REDACTED]. She stated that she was in a room full of police officers who were anti-Brooks and pro-B [REDACTED], and that it would not have been in her interest to say anything. She stated that the new captain called her into his office on October 10, 2012 and told her that she was to report to a new assignment on October 13, and this was a result of disciplinary action.

Gelman stated that it was important to know that she was no longer overtime eligible as of October 27, 2012, since that could affect the remedy sought by the Union.

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On cross-examination, Brooks testified that B [REDACTED] didn't like her because of the criminal and corruption allegations she brought against him. In response to Attorney Kerstetter's ("Kerstetter") question, she stated that she was surprised at the nice things B [REDACTED] said about her, and that it was his body language and actions rather than language that said he didn't like her, i.e., all the intentional oversights with respect to her overtime. She acknowledged that she had no data/reports to support her belief that her overtime was missed more than other police officers. She confirmed the alleged threatening remarks to B [REDACTED], and that this was in front of K [REDACTED]. In response to Kerstetter's question she testified that she was not surprised to hear that K [REDACTED] denied seeing any interaction between her and B [REDACTED] that day, because on the day her overtime was omitted, he, K [REDACTED] received 2 hours of overtime for which he was not present.

She acknowledged that she heard that, except for W [REDACTED], every police officer's testimony was different from her own, but was not surprised, because "when you cross the blue line," in this case, reporting corruption in narcotics, could affect every witness. She testified that other police officers were absolutely lying. She testified that everyone was afraid, and that B [REDACTED] had been stealing from drug dealers for a long time. She stated that until now she had not been aware that the IA investigated the corruption charges, and found that the charges were unfounded. She was unaware that the IA investigation revealed that although she had claimed to see the thefts, that all other witnesses in the IA investigation did not see the things that she, Brooks, accused B [REDACTED] of.

Brooks testified that she hadn't signed the notices (C-2) because she felt that B [REDACTED], K [REDACTED] and M [REDACTED] were using the investigation as a tactic to silence her. Kerstetter asked her to confirm that she believes that the reason her story is different from the others is due to the reports she made and she confirmed that this was the basis for her belief. Kerstetter then presented her with exhibit J-3, the Statement of Charges, and she acknowledged that the signature at the bottom of the page dated January 16, 2013 was hers, but that she had only seen that page from the packet. When being asked whether she had seen the notation that transfer might be a part of the formal disciplinary process, she testified that she hadn't seen it at the

time she signed the document. Exhibits U-1, U-2 and U-3 were then offered and accepted into evidence.

CLOSING ARGUMENTS

Kerstetter's Closing

In his closing argument, Kerstetter cited three issues that the Arbitrator must address:

1. The conduct that was testified to by B [REDACTED] and the other police officers that has no place in any workplace, especially a police workplace.
2. That the process was thorough and fair, and followed procedure to the letter, including offering her an opportunity to testify and cross-examine witnesses, and that at every step in the process she was found to have been in violation of the Code of Discipline.
3. That she was specifically found in violation of Section 4-§-003-10 of the Disciplinary Code which is the use of **"profane, insulting, or improper language, conduct, or gestures toward, in the direction of, or in relation to, a superior officer."**

Exhibit J-4, the Notice of Discipline, was discussed and placed into evidence. Kerstetter stated that the matrix of permissible disciplinary action for a first offense finding insubordination is 15-30 days of unpaid suspension, and thus it is clear that the 15-day suspension was the least harsh penalty that could have been imposed in this system of progressive discipline.

With respect to the issue of transfer, Kerstetter reminded the Arbitrator that the Notice of Charges, signed by the Grievant, included in **bold** letters directly above her signature, the statement that transfer may be a part of the formal disciplinary process. Beyond the question of whether she saw it or not, there is the matter of the necessity of transfer, given the profane exchange between Brooks and her superior officer, B [REDACTED] – all this in view of other police officers. Therefore, she could not continue to work

in that environment where she has accused other police officers of corruption.

The question of her ineligibility for overtime was based on matters that took place long after the June 2012 incident, and is therefore irrelevant to this grievance.

Kerstetter closed by asking the Arbitrator to find that the disciplinary action was imposed for just cause.

Gelman's Closing

Gelman began his closing by agreeing that due process was properly observed at every stage of the disciplinary process. He argued that the Arbitrator had to find that the City proved that there was just cause for each element of her discipline – both the suspension and the transfer, and that P.O. Brooks violated the definition of insubordination in section 4-§-003-10 of the Disciplinary Code, and that in the absence of evidence, that at the very least the transfer should be rescinded. Gelman went on to comment on the various inconsistencies in the testimony of the City's witnesses as to what each saw or heard. He noted that the City called W [REDACTED] as a witness and his testimony was completely inconsistent with B [REDACTED]'s and the two other City witnesses. He concluded by asking the Arbitrator to implement the "make whole" remedy that was requested in the Union's opening, since the City did not have just cause for imposing discipline.

DISCUSSION AND OPINION

This case is the appeal of a finding of insubordination and subsequent disciplinary action, brought by the Union on behalf of the Grievant, Police Officer Theresa Brooks.

Both parties agree that prior to the arbitration, full due process was observed in this case. Although she was found to have violated the Disciplinary Code in the proceedings below, I find that the PBI report is evidence of due process, but not evidence of the truth of the findings therein.

I am reviewing this case based on the credible testimony of the witnesses before me together with the exhibits and documents presented.

I find that whether or not Brooks and B [REDACTED] looked at one another, it is clear that B [REDACTED], W [REDACTED] and S [REDACTED] all came to believe that the Grievant was speaking to or in relation to a superior officer, Sgt. B [REDACTED]. Additionally, I find that whether or not Brooks' statement that "he's trying to intimidate me and I am not afraid of him," is arguably a threat, that she did use threatening language when she said, "I'm going to tear his ass up," or words to that effect, which is clearly a threat of bodily harm in relation to a superior officer, and is thus in violation of the Disciplinary Code.

Among the City's witnesses, only W [REDACTED] testified that he neither heard the profanity nor saw any interaction between Brooks and B [REDACTED]. I find that there was at least insulting and disrespectful language to a superior officer, if not in the processing room then at least in K [REDACTED]'s office with B [REDACTED], Brooks and K [REDACTED] present. The Disciplinary Code, as quoted above, defines insubordination to include profanity and insulting language in relation to a superior officer, which I find took place.

I am persuaded that the preponderance of the credible evidence supports the City's case, even though, as Attorney Gelman posits, there were variations in the City's supporting testimony. I find that the Grievant's testimony arguing that there is a grand conspiracy against her because of her allegations of corruption, implausible and not credible, since in this situation it would require all of Strike Force, IA and senior management to be complicit.

With respect to the issue of the Grievant's ineligibility for overtime in District 35, I find that it is not relevant here, since the transfer was necessary, and the ineligibility relates to matters that took place long after June 6, 2012. The transfer was necessary since it is only common sense that she could not successfully or safely work with a group of police officers who she had accused of corruption and lying in their testimony.

Having thoroughly considered all the evidence, including the testimony, documents, exhibits, allegations and arguments of both parties at the hearing before me, I have determined for the reasons detailed above that the City has met its burden of proof and the grievance must be denied.

AMERICAN ARBITRATION ASSOCIATION

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CITY OF PHILADELPHIA, PA

Docket No. 14-20-1300-1658 (Consolidated)

Grievant: Theresa A. Brooks-Whitaker, Payroll No. [REDACTED]

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The undersigned arbitrator, having been designated in accordance with the Collective Bargaining Agreement entered into by the above parties, and having duly heard the proofs and allegations of the parties, AWARDS as follows:

The grievance is denied.



ERNEST WEISS, ARBITRATOR

STATE OF NEW JERSEY)

) ss:

COUNTRY OF SOMERSET)

On this 28th day of January, 2015, before me personally came and appeared Ernest Weiss, known to me to be the individual described in, and who executed the foregoing instrument and he acknowledged that he executed the same.